United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2567

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Plaintiff-Appellee

Docket No. 74-2567

-against-

RAFAEL MELLAFE, indicted herein as
RAFAEL LIRA

Defendant-Appellant

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BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT UNDER SECOND CIRCUIT RULE 28

The decision herein was rendered after a jury trial before United States District Court Judge CHARLES E. STEWART, JR., in the United States District Court for the Southern District of New York, on October 24th, 1974, which found the defendant-appellant guilty as charged.

Prior to the commencement of trial, the defendant made a motion to dismiss the indictment as to him on the grounds that he was deprived of his Constitutional rights by being kidnapped and brought into this jurisdiction without his consent. This motion was denied by Judge CHARLES E. STEWART, JR., after a hearing in which both the government and the defense presented their proofs.

STATEMENT OF THE ISSUE

The sole issue in this case is whether the defendant-appellant's Constitutional rights were violated by the manner in which he was brought from Chile into the jurisdiction of the United States District Court for the Southern District of New York.

STATEMENT OF THE CASE

The defendant-appellant was indicted on Indictment #73CR751 which charged that the appellant, along with certain others, entered into a conspiracy to import and distribute narcotics in violation of 21 USC Sections 173, 174, 812, 841, 951 and 952. The appellant was tried separately in the United States District Court for the Southern District of New York before HON. CHARLES E. STEWART, JR., United States District Judge, and a jury. The appellant was found guilty as charged and on November 22nd, 1974 was sentenced to five years in prison and a special parole period of three years.

Prior to trial, the appellant served and filed a motion addressed to the indictment and charging that he was deprived of his rights under due process of law in that he had been kidnapped into the United States by American agents. The government filed answering affidavits and a hearing was held by JUDGE STEWART on October 8, 1974. In the hearing the appellant testified on his own behalf and stated that he was a resident of Santiago, Chile and engaged in the meat business in that city. On March 7, 1974, he was placed under arrest by Chilean police in Santiago, Chile. He was taken to a police station at Rogelio Ugarte Street where he was held for one hour and then taken to a police station in the Rosita Renard neighborhood of Santiago. At the Rosita Renard station house he testified that he was directed to strip naked and was fastened to a box spring on the floor, tied by the feet and arms and gagged. He said that he was then questioned about the whereabouts of CHRISTIAN ALVEAR and during that questioning electrical equippment was attached to his genital organs, his stomach and finally inside each ear. During this process he was also

beaten and struck. This torture session lasted for two or three hours. There was a respite and then he was tied up again and blindfolded and he heard several people come into the room with the police. He could not see them but he heard them speaking English in a low tone.

He was then taken to a restaurant where he was compelled to pay for the meal of the Chilean police and then taken to his home on Louis Uribe Street, where the Chilean police searched the house. He was then taken back to the Rosita Renard station house where he was again beaten and informed by the Chilean police that they would make him eat human feces. A pot full of human feces was put toward him which nauseated him and he vomitted. He was held for four days in the Rosita Renard station house and on the fourth day was required to sign a document, being informed that he would be released. On the fifth day a Lt. Gandolfi of the Chilean police informed him that someone had filed a habeas corpus on his behalf which Lt. Gandolfi referred to with an obscenity. He was then taken to the Chilean Naval Prison, Silva Palma, in Valparaiso, which he described as a torture camp, where he was placed in a room with thirty prisoners with just one toilet. His head was covered with a hood so he could not see where he was being taken. He estimates that he spent from eighteen to twenty days in that prison and that he, along with other prisoners there, would be taken out during the night, at any hour, with their black hoods on, to have electrical shocks applied to their bodies and to be beaten with karate blows. (Trans. P. 39)

Following his confinement in the Naval Prison for the aforesaid period of about twenty days, he was taken to the Office of the Naval Prosecutor where he was required to sign a document and he was questioned by the Chilean Naval Prosecutor concerning CHRISTIAN ALVEAR and firearms. He was photographed and told that "some gringos, some Americans, are waiting for this photograph". (Trans. P. 42)

From there he was taken to the jail for political prisoners at Valparaiso, where they were given special treatment. On May 3, 1974, he was taken again to the Naval Prosecutor's office with other Chileans who were there with him. He was required to sign a piece of paper for his freedom and then a piece of paper that said "decree" which he found out later was a decree of expulsion. When he left the office of the Prosecutor there were other Chilean police there and two American agents, one of them being CHARLES WILLIS CECIL, JR., and the other one a MR. FRANGULIS. (Trans. P. 44) He said he was put into a police van and the two Americans got into a car that was further back in the line, together with Chilean police. They were returned to Santiago and from there taken to Puduhuel Airport in Santiago, Chile. He was examined by a physician there, given some pills which made him drowsy and from there taken in a vehicle which circled the airport, came in the back way, and took them next to the stairs leading into the airplane so that they did not pass through the terminal.

American agents including CECIL, and FRANGULIS, were on the plane and placed them in their seats. Chilean police and American agents rode

with them on the plane as far as Lima, Peru, when FRANGULIS, the American agent, left the plane and remained in Lima while CECIL stayed on the plane. The doctor, later identified as a DR. CIFUNI, accompanied them on the plane. The appellant testified that he had never been in the United States in his life and that he had no criminal record in Chile. The appellant was then placed under arrest when the plane arrived in the United States. He identified CECIL in the courtroom, CECIL having been called in for that purpose. (Trans. P.88)

CHARLES WILLIS CECIL, Jr., was called on behalf of the government and testified that he was employed as a special agent of the Drug Enforcement Administration in Santiago, Chile and had been there for several years. He said that the first time he had seen the appellant was on May 4, 1974 in Santiago, Chile when the appellant was placed aboard the Braniff airliner together with six Chilean police officers, DR. CIFUNI and six D.E.A. agents. He denied having been in Valparaiso, Chile on May 3, 1974. He admitted on cross examination that he had been advised by the Chilean police shortly after March 7, 1974, that the appellant was taken into custody and that the arrest of the appellant was made at the request of the D.E.A. office in Santiago. (trans. P. 96) He denied having made any electronic surveillance of the appellant, but said he may have checked his long distance telephone calls and further admitted that he had been investigating the appellant prior to his arrest. (Trans. Pp. 98, 99)

While a copy of the expulsion decree from Chile was attached to the moving papers and a further copy to the answering affidavit of the government,

the court ruled that it would not go into any question of Chilean law.

After the motion was denied the trial proceeded and the defendant was convicted and sentenced as set forth herein.

POINT I

THE FEDERAL COURTS HAVE NO JURISDICTION OVER MELLAFE SINCE HE WAS BROUGHT INTO THE UNITED STATES BY FEDERAL AGENTS IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE CONSTITUTION

The doctrine of Ker v. Illinois 119 U.S. 435 (1886), Frisbie v. Collins, 342 U.S. 519 (1952) has been erroded by the later case of Rochin v. California, 342 U.S. 165 (1952) dictum in U.S. v. Russell, 411 U.S. 431 (1973) and in the Second Circuit by the case of U.S. v. Toscannino, 500 fed. 2d 267 (1974). While the concept of due process under Ker and Frisbie was that the only requirement was that a defendant receive a fair trial in the jurisdiction where he was tried, this concept has been substantially changed by the cases which followed. While the Frisbie case went so far as to say that there was no violation of due process where the defendant had been knocked unconscious in Illinois and taken by force across the state line to Michigan by Detroit policemen, the concept gradually arose that where the conduct of the police agents was such as to shock the conscience and offen the sensibilities, then the Constitutional rights of due process of the defendant had been violated.

In Rochin v. California, 342 U.S. 165 (1952) police entered the defendant's home, and seeing him swallowing a capsule they believed to contain morphine they brought him to a hospital and had the capsule pumped

out of his stomach. On the defendant's claim that this denied him due process, Justice Franfurter held:

> Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings... in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski v. New York, 324 U.S. 401, 416, 417. Rochin v. California, supra at 169.

The landmark opinion continued:

> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious seueamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents--this course of proceeding agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentation.
>
> .....Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."....It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.
>
> .....So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Rochin v. California, supra at 172-173

As Rochin was decided nine years before Mapp v. Ohio, 367 U.S. 643 (1961) extended the Fourth Amendment's exclusionary rule to the states,

Rochin relies on the Due Process Clause of the Fourteenth Amendment. If the Constitution forbids extraction by force of the contents of a defendant's stomach because it offends against the standard of conduct required of law officers, must then the Constitution equally prohibit the conduct of American agents abroad in subverting foreign law so as to secure the unlawful delivery of foreign nationals into their hands. In U.S. v. Toscannino, supra, this court held that, if proven, the conduct of agents of the United States government in kidnapping Toscannino from Uruguay to Brazil, subjecting him to torture in Brazil and then transporting him to the United States, was a violation of due process.

In the instant case, MELLAFE was arrested at the request of the D.E.A. office in Santiago on March 7, 1974, (Trans. P.96) and agent CECIL was notified by the Chilean police when this was done and MELLAFE was in custody (Trans. P. 96). Admittedly we have no proof that any representatives of the United States government were present at the time that MELLAFE was tortured. The government in the case has not denied the issue of torture by the Chilean police but may we not assume that if MELLAFE was arrested and taken into custody at the request of the D.E.A. and they were so notified, that the D.E.A. must accept the responsibility of any torture to which he was subjected after having been arrested at the request of the government.

At the point of MELLAFE'S arrest the Chilean police were acting at the request of the United States Government and the United States Government was responsibile for their actions. The D.E.A. was constantly notified by the Chilean authorities as to where MELLAFE was being held. (Trans. Pp. 101,102)

In short, the arrest was made at the request of the D.E.A. and they were informed as to the location of MELLAFE at all times.

MELLAFE testified that he was given drugs when he boarded the plane by a doctor engaged by the D.E.A.

The recent decision of this Court in U.S. ex rel Lujan v. Gengler, docket No. 74-2084 and decided January 8, 1975, does not affect the facts in the instant case. Lujan had not alleged any brutality nor any drugging when he was placed on the plane. Lujan was lured into Bolivia where presumably the police were friendly to American agents and there arrested by Bolivian police, turned over to American agents, and then flown to the United States. Lujan's case is based on alleged violations of international law. MELLAFE, however, was arrested by Chilean police at the request of the D.E.A., subjected to torture of the vilest kind, while the D.E.A. was notified of the various places he was held in confinement, drugged by a doctor employed by the agents and placed on board a plane controlled by American agents in Chile. Having placed the matter in motion by causing the arrest of MELLAFE on March 7, 1974, and having been informed of the progress of his incarceration, the government cannot now wash its hands of the entire situation by saying that agents did not see him in jail nor not knowing of the shocking torture to which he was subjected.

Certainly, the circumstances of his having been placed on board the plane by the back entrance to the airport and not passing MELLAFE and other prisoners through the regular terminal, none of which was denied by the government at the hearing, must inevitably lead to the conclusion that the whole circumstances were such as not to bear the light of day. This is not a case of a mere

illegal kidnapping but the participation of agents of the American government in conduct which shocks the conscience. In Lujan this court said on Page 8 in differentiating it from Toscannino,

> But the same cannot be said of Lujan. It requires little argument to show that the government conduct of which he complains pales by comparison with that alleged by Toscannino. Lacking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process. Unlike Toscannino, Lujan does not allege that a gun blow knocked him unconscious when he was first taken into captivity, nor does he claim that drugs were administered to subdue him for the flight to the United States. Neither is there any assertion that the United States Attorney was aware of his abduction, or of any interrogation. Indeed, Lujan disclaims any acts of torture, terror, or custodial interrogation of any kind.

Here however, we have uncontroverted testimony by the defendant that not only were drugs administered to subdue him for the flight to the United States, but we have the admission of the government agents that they were aware of his arrest which was made at their request, and that MELLAFE was tortured. Certainly if MELLAFE was arrested by Chilean police at the request of the Americans then the interrogation and torture to which he was subjected was indulged in by the Chilean police in furtherance of the instance of the American agents. MELLAFE has testified that he was released at the office of the Naval Prosecutor on May 3, 1974 so that there were no Chilean charges pending against him.

Certainly the facts in the instant case require a finding that this appellant was deprived of due process.

POINT II

THE GOVERNMENT MADE NO EFFORT TO EXTRADITE MELLAFE UNDER THE PROVISIONS OF THE EXTRADITION TREATY EXISTING BETWEEN THE UNITED STATES AND CHILE BUT RELIED ON AN EXPULSION ORDER UNDER THE THE FACTS OF WHICH THE ORDER WAS UNLAWFUL

An extradition treaty exists between the United States and the Republic of Chile which was proclaimed in 1902 and which was attached as an Exhibit "A" to the government's affidavit in opposition to appellant's motion in the District Court. No proof was offered by the government that any attempt was made on its behalf to secure the extradition of this appellant. Instead the government relies on the expulsion order a copy of which is attached in translation to the moving papers of the appellant as Exhibit "A" and to the government's answering affidavit.

This expulsion decree was issued under the provisions of Decree Law No. 81 of the Chilean Junta. Article II of the decree provides, as shown in Exhibit "C" attached to the moving papers, as follows:

> Those who are objects of these measures of expulsion and abandonment of the country shall be able to freely choose their place of destination.

In the hearing we have the uncontroverted testimony of MELLAFE that when he was released by the Chilean Naval Prosecutor's office in Valparaiso, he was taken into custody by Chilean police accompanied by American agents who took him in handcuffs and put him on board a plane to the United States. By the testimony of CECIL, the American agent, the government was awaiting

the signing of an expulsion order in order to get this appellant to the airport. Agent CECIL testified as to his knowledge of the whereabouts of MELLAFE as follows:

> Just as to where he was being held in case an expulsion order was signed and we had to get him to the airport. (Trans. P. 101)

CECIL, the American agent, knew that MELLAFE would not be given the choice of any country to which he might go, but would be turned over to the Americans. In presenting this argument the appellant is not urging this Court to go into the facts of Chilean law, but merely to point out that the representatives of the government knew that Chilean law would be violated by the Chilean police and concurred in that violation.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED AND THE DEFENDANT RELEASED FROM CUSTODY ON THE GROUND THAT HE HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS.

Respectfully submitted,

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